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No. 90-1678

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

THE STATE OF COLORADO,
Petitioner,
vs.
PHILIP LESLIE GALIMANIS,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

On Certiorari to the Colorado Court of Appeals
Court of Appeals No. 84CA0809

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ARGUMENT

A. THIS CASE RAISES THE SIGNIFICANT QUESTION OF WHETHER AN ACCUSED'S REQUEST FOR COUNSEL IS ADMISSIBLE WHERE IT IS THE ONLY EFFECTIVE MEANS BY WHICH THE STATE CAN SHOW THAT HIS POST-ARREST BEHAVIOR WAS INCONSISTENT WITH HIS CLAIM OF INSANITY.

This case illustrates the unfairness of precluding the prosecution from using a defendant's request for counsel to respond to an insanity defense in which an accused

unquestionably places his demeanor in evidence. It also illustrates how the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976), needs modification in the sanity context. Without such modification defendants have license to construct theories of insanity in which both bizarre behavior and compliance with authority are represented as mindless. Accordingly, this case affords this Court a unique opportunity to right the inequity that allows defendants unrestricted use of their demeanor to support theories of insanity while preventing the prosecution from using highly relevant evidence of sane, rational conduct. *See Wainwright v. Greenfield*, 474 U.S. 284 (1986) (Rehnquist, J., concurring).

There are no procedural or factual obstacles to review by this Court. The distinction between the right to counsel and the right to silence articulated in the concurring opinion in *Greenfield*, was raised in the state supreme court (*see* Appendix A attached hereto). Similarly, the highly technical definition of "rebuttal" which applies in guilt trials where defendants are presumed innocent has no significance in a Colorado sanity proceeding where defendants have the initial burden of presenting evidence of their insanity. And, contrary to respondent's belief, respondent did produce evidence regarding his demeanor in custody after his arrest (*see* Appendix B attached hereto).

This case perfectly illustrates the inadequacies of *Greenfield* and the need for review by this Court. In *Greenfield*, the majority held that "carefully framed questions" which circumvent an accused's assertion of constitutional rights could serve the state's legitimate interest in showing that an allegedly insane defendant behaved rationally after arrest. *Id.* at 295. Here, however, there was expert testimony indicating that the "structured setting" of official custody alleviated the "symptoms" of

respondent's insanity (*see* Appendix B). Thus, police testimony which simply showed an ability to recognize persons, understand directions, or converse, did not adequately show respondent's sanity after arrest. Unlike mere coherent speech or correct perception, a defendant's request for counsel shows his cognitive ability to recognize he is in a serious predicament from which he needs to extricate himself. Here, it showed that instead of being a mindless automaton who simply recognizes authority and follows directions, respondent was a sane and rational person capable of understanding and asserting his need for legal assistance.

The issue presented here is essential to a fair and reliable determination of insanity claims where the accused relies extensively on demeanor evidence. Such cases are not unique to Colorado. Nineteen other states have joined in an Amicus Brief asserting that this issue is of such paramount importance that it is deserving of this Court's attention.

B. THE BIFURCATION OF THE PROCEEDINGS IS AN EXTREMELY SIGNIFICANT FACTOR NOT PREVIOUSLY CONSIDERED IN A PERTINENT DECISION BY THIS COURT. THIS BIFURCATION RESTRICTED THE USE OF DEFENDANT'S SILENCE TO A

PROCEEDING WHERE SILENCE DID NOT PREJUDICE HIM, THUS RENDERING ANY ERROR HARMLESS.

This case presents the unique question of whether bifurcation rendered harmless any constitutional error relating to mention of silence at a sanity trial. *See People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988), Metzger, J. dissenting, at 650. The *Greenfield* case involved a unitary proceeding where the jury which found the accused sane also could have considered his silence as suggestive of guilt. Accordingly, this case affords this Court a unique opportunity to consider whether *Greenfield* actually advances the due process interests of defendants in states which provide bifurcated proceedings or whether it has the opposite effect by discouraging bifurcation.

At the sanity proceeding below, the state properly recognized that silence had virtually no probative value for the prosecution. Accordingly, the prosecution emphasized respondent's request for counsel, not his "insolubly ambiguous" silence. *See Doyle v. Ohio*, *supra*. Moreover, in the context of this sanity trial, mention of silence could not prejudice the insanity claim of respondent who purportedly functioned in a "waking dream" with occasional withdrawal from conversation with others (*see* Appendix B).

Once again, these issues are not unique to Colorado. Twelve other states provide bifurcated proceedings for insanity pleas (Pet. for Cert. n.2 at 9). These thirteen states need specific guidance from this Court regarding the constitutional significance of separate sanity and guilt proceedings.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Pertinent Portion of State's Reply Brief in Colorado Supreme Court

In addition, defendant's first assertion[2] of Miranda rights immediately after his arrest was not an invocation of his right to remain silent in the face of *investigative* questioning by the police. Rather, this assertion followed a police question about the presence of a weapon (v. 9, p. 164, 11. 17-22). Such non-investigative questions are permitted under a public safety exception to the Miranda requirement. *New York v. Quarles*, 467 U.S. 649 (1984). Defendant's response to this particular non-investigative inquiry was thus outside the purview of *Wainwright v. Greenfield* and did not constitute an invocation of the right to remain silent which would be inadmissible in a sanity proceeding. *See Commonwealth v. Hunsberger*, 565 A.2d 152 (Pa. 1988). First, there is no implied promise that a response to police inquiries under the public safety exception to the *Miranda v. Arizona*, 384 U.S. 436 (1966) will never be used in any proceeding. *See Quarles*, *supra*. Second, defendant's assertion of his right to counsel was not even responsive to the officer's question which sought information for public safety, not investigative purposes. **Rather, it was a spontaneous, unelicited statement regarding *counsel, not silence* and as such, its admission was not barred by *Wainwright v. Greenfield*. See *Hunsberger*, *supra*.** If this statement had come in response to a question which asked defendant whether he wished to answer investigative inquiries, a *Wainwright v. Greenfield* analysis

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[2]There were two Miranda assertions, one to Officer Keiser shortly after arrest and one to Detective Light some time later that same morning (v. 12, pp. 162-164, 218-219).

would properly apply. However, *Wainwright v. Greenfield* is properly inapplicable to spontaneous or non-responsive assertions which do not serve to terminate *investigative* questioning. *See Hunsberger, supra.*

(emphasis added).

APPENDIX B

Pertinent Testimony of Dr. Steven Miller

Q Are there times, though, that a person who experiences psychoses can go back into reality or does a person in this state always maintain those kinds of out-of-touch-with-reality situations?

A Well, a lot of what goes on in life you can handle with a very tenuous hold on reality, a very slim hold on reality. Much of what we do is not important in terms of getting you through the day.

For example, it has been reported to me by the jailer, one of the jailers, that at times it appeared to him that Mr. Galimanis was functioning well in the jail. Okay. How do you explain that? If this guy is having this waking dream, how in heavens can you explain it?

The way I like to say it is this: Suppose you are standing there. I give you one ball. I say throw the ball up in the air. Okay? So you start tossing the ball up and down and then I say, okay, here's another ball, catch it. Now you've got two balls. Then I toss another ball to you. Before you know it, there's three, four, five balls. They're all over the place. They're bouncing off the walls. These people cannot juggle. They cannot get themselves into a place in which they can get more than one, two balls going at a time.

When this fellow is in jail, he has no balls to juggle. They say get up. They say sit down. And by the way, even when they tell him to get up, most of the time he won't. For example, the second time I went to see him he wouldn't get up to be examined by me for over an hour, and finally agreed to come out and visit with me.

So they say go to sleep, wake up, here's your meal, there's the bathroom. I mean, this is what I would consider not having very many balls to juggle, but the

minute you start throwing another ball, which is what happened in the psychiatric interview, make sense of the world for a minute, tell me how you feel, here's another ball for you, what about this, what about that, and then you see him begin to disintegrate. His ability to keep all of these things going at one time disappears.

Q Okay. So it would be your opinion, then, that being in a structured setting such as the jail wouldn't necessarily -- might help the symptoms that are associated?

A That's right. If you give somebody one ball, they're throwing it up and down, you say, boy, can that guy juggle, but it's when you are required to handle life, all the various things going on at the same time that we say that you are able to handle reality or not.

CERTIFICATE OF MAILING

I, Gale A. Norton, a member of the bar of this court, herewith certify that the within REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI has been deposited in the United States Mail, first-class postage prepaid, addressed to Mr. Joseph Spaniol, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20593 and that to my knowledge the mailing took place on June 17, 1991, within the permitted time for filing the brief.

GALE A. NORTON
Attorney General

Subscribed and sworn to before me in the County of _____, State of Colorado, this _____ day of _____, 1991.

_____
NOTARY PUBLIC

My Commission expires:

_____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 17th day of June, 1991, addressed as follows:

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